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IN THE

Supreme Court of the United States

October Term, 1955

UNITED STATES OF AMERICA ex rel.
SANTO CAMINITO,

Respondent,

—against—

ROBERT E. MURPHY, as Warden of Auburn Prison, State of New York and THE PEOPLE OF THE STATE OF NEW YORK,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JACOB K. JAVITS
Attorney General of the State of New York

EDWARD S. SILVER
District Attorney, Kings County
Attorneys for Petitioners

WILLIAM I. SIEGEL
Assistant District Attorney

JAMES O. MOORE, JR.
Solicitor General
of Counsel

32 CASE PRESS, 80 Ferry Street, N. Y. C.—COrtlandt 7-0484-0485

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

ROBERT E. MURPHY, Warden of Auburn Prison, State of New York and the People of the State of New York, the petitioners herein, respectfully pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit entered on May 11, 1955 reversing the denial of an application for a writ of habeas corpus.

Previous Proceedings

Respondent and co-defendants Bonino and Noia were convicted after trial in the County Court of Kings County on March 2, 1942 of the crime of Murder in the First Degree for the shooting and killing of one, Murray Hammeroff. The jury made a recommendation of clemency pursuant to Penal Law, Section 1045-a and respondent and co-defendants were sentenced to life imprisonment.

On appeal to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, the judgment of conviction was affirmed without opinion (265 App. Div. 960). The Court of Appeals of the State of New York affirmed the judgment without opinion, 291 N. Y. 541.

In 1948, respondent moved in the Court of Appeals *pro se* for re-argument, but the motion was denied on March 18, 1948 (297 N. Y. 882). On June 3, 1954, the Court of Appeals denied a further motion for re-argument made through counsel (307 N. Y. 686).

On October 14, 1954, the Supreme Court of the United States denied a petition for *certiorari,* Black and Douglas, *JJ.* dissenting (*Caminito* v. *People of the State of New York,* 348 U. S. 839).

Respondent then sued for a writ of habeas corpus in the United States District Court for the Northern District of New York. The District Court dismissed the petition but granted a certificate of probable cause for appeal.

On May 11, 1955, the United States Court of Appeals for the Second Circuit entered judgment reversing the order of the District Court and the District Court then

made an order granting the writ and directing that respondent be transferred by the petitioner to the custody of the Commissioner of Correction of the City of New York to await trial on the original indictment.

Opinions Below

The District Court opinion is reported in 127 F. Supp. 689. The opinions of the United States Court of Appeals are reported in 222 F. 2nd 698.

Jurisdiction

The jurisdiction of the District Court was invoked by respondent under Title 28, Section 2254, United States Code. The jurisdiction of this Court is invoked by petitioners under Title 28, Section 2101-c and d, United States Code, and Rule 22 of the Revised Rules of this Court effective July 1, 1954.

Question Presented

Petitioners contend that the United States Court of Appeals erred in its judgment holding inadmissible in evidence confessions made by petitioner to police officials and the District Attorney of Kings County upon the ground that his right of due process had been violated as a matter of law because these confessions were tainted by various coercive practices. It is petitioners' contention that the confessions were voluntarily made and, therefore, constitutionally admissible in evidence against petitioner.

Applicable Constitutional and Statutory Provisions

(1) Constitution of the United States, Fourteenth Amendment, Section 1:

> "• • • Nor shall any State deprive any person of life, liberty or property, without due process of law; • • •"

(2) Constitution of the State of New York, Article 1, Section 6:

> "• • • Nor shall he be compelled in any criminal case to be a witness against himself;
>
> "• • • No person shall be deprived of life, liberty or property without due process of law."

(3) Code of Criminal Procedure of the State of New York (a) Sec. 395:

> "Confession of defendant, when evidence, and its effect.
>
> A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the District Attorney that he shall not be prosecuted therefor; but is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed."

(b) Sec. 165:

> "Defendant, upon arrest, to be taken before Magistrate.
>
> The defendant must in all cases be taken before the Magistrate without unnecessary delay; and he may give bail at any hour of the day or night."

Record Facts Material to the Questions Presented

The People's Case

JOSEPH AARONSON was in his Brooklyn home on the evening of February 15, 1941 when he heard a noise outside (109)* which caused him to run to the street. There he smelled the odor of gun powder and, finding the victim of the shooting, Hammeroff, drove him to the hospital.

HERMAN WEINER was in his home, adjacent to the scene. He heard "terrible screaming" (135) and looked out the window. He noticed a parked car which almost immediately "made a U-turn" (143) and, with tires squealing, left the vicinity "rather fast" (144).

DETECTIVE EDWARD MITCHELL took respondent into custody for investigation on May 11, 1941 (147). Respondent was then driving his own automobile which resembled in a number of details (153) the car which Mr. Weiner had seen on the night of the killing.

DETECTIVE THOMAS L. KENNY interrogated Hammeroff in the hospital (176), receiving from him a description of three men for whom he broadcast an alarm. He continued his investigation of the case until May 11, 1941 (183). On that day, he arrested co-defendants Noia and Bonino. After a conversation with them he apprehended respondent (200) and took him at about 9:00 P.M. (206) to the station house. There the three suspects were *separately*** questioned (213) from about 9:00 o'clock in the evening

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* References are to folios in the case on appeal in the New York Court of Appeals, a copy of which has been duly filed with the Clerk of this Court.

** The fact of separate questioning will be stressed throughout this petition, since it importantly affects the time factor.

until midnight, when they and the police (Lt. Meenahan, the commanding officer, Detectives Manes and Kenny) had coffee and sandwiches (215). The interrogation was then renewed until 2 o'clock in the morning when the three men were placed in cells where they slept on "a big bench" (216). At 10 o'clock in the morning Lt. Meenahan and Manes arrived at the precinct and the *separate* questioning of the suspects (222) was resumed until Noon. In the afternoon, Kenny saw two policewomen enter the room in which the defendants were (230). They remained there a few minutes and when they left, and somewhat later in the afternoon, the three suspects conferred together alone (235). Beginning about 6 o'clock on the afternoon of Monday, May 12th, the three were *separately* questioned by Capt. McGowan (237) in the presence of a police stenographer (234, 239) until 11:30 P.M. Shortly thereafter an Assistant District Attorney arrived with his stenographer and *separately* questioned the three until about 2:30 the following morning. The defendants were, after having been given sandwiches and coffee, then taken to another precinct where they were fingerprinted and booked. The next morning they were taken to the line-up for photographing and were then arraigned in the Felony Court (241).

Kenny testified under cross-examination that he had spoken to respondent about the case two or three times only during the questioning between about 9 o'clock P.M. and 2 o'clock A.M. (304). He described the cell in which respondent slept as being equipped with a wooden bench without spring, blanket, pillow or mattress (307), but with heat. He did not know if the heat was then on. The interrogation was participated in by two or three police offi-

cials (312). Until the morning hour respondent denied any knowledge of the crime. He was given food during this period (316) and again at about 10 o'clock in the morning (323). The morning interrogation was also participated in by no more than three or four detectives (324). Respondent continued his denials. His first admissions of guilt, made about 5 or 6 o'clock on the afternoon of Monday, May 12th (336), were recorded by a police stenographer (341). This recording lasted until about 11:30 P.M., *but it should be noted that the questioning and recording was not that of respondent alone, but of all three suspects* (342-344). At midnight, the District Attorney arrived with his stenographer (345) and made his interrogation and recordation *of the three.* They were then booked at about 2:30 A.M. on Tuesday, May 13th and were arraigned in the Felony Court that morning. They had not had counsel during the interrogation (351). Kenny had seen no one mistreat or threaten Caminito, nor had he heard anyone address any opprobious language to him (450). Respondent identified the car used during the killing.

Detective Richard Manes (with Kenny and Mitchell) apprehended Bonino and Noia on May 11, 1941 (493). He took them first to Noia's home for a search, then later in the evening at about 9 o'clock to the precinct where respondent was (498). The three were then *separately* questioned by Lt. Meenahan (Kenny, Mitchell and Manes participating *and with interruptions during the process*), until about midnight (501). They were then fed, again interrogated and about 2 o'clock in the morning of Monday, May 12th, placed in cells where they slept (503). After they had breakfasted (506), they were questioned

for not more than an hour (507) until just before noon. Two policewomen arrived and with a detective went into the room where the defendants were (512). Following this episode and about 2 o'clock in the afternoon, Manes spoke to Noia. The latter conceded the correctness of the police information saying: "That was right on the head" (519). He asked to talk "to the other two fellows" saying: "Well, I will tell you my part, but, I don't want them fellows to think I am a rat. I want them to do their own talking" (520). Permission was granted and the three suspects were left alone together for about three-quarters of an hour (524). They then made their statements to the police officials and the stenographers. This was about 6 o'clock in the evening (525).

Caminito's experienced and able counsel, Mr. Barshay (formerly an Assistant District Attorney and now a County Judge), subjected Manes to a rigorous and detailed cross-examination. The witness denied having mistreated Caminito in any fashion (539-545 *seq.*, 555) or having threatened to arrest members of his family. He repeated that which the jury already knew: that until midnight Caminito had not used the telephone and had not been "booked" (544); that no one had identified him as a participant in the crime; that the cell in which he slept was without bed, pillow or blanket (549). He denied that he had refused Caminito's request for food at about 6 o'clock on Monday, May 12th, just before the stenographer began to take notes (555), or that he had at that point prevented Caminito from falling asleep (556).

Detective Joseph Gilhuley, a police stenographer (606), took the stenographic record and made the tran-

script therefrom of statements given by defendants to the police (608). Caminito began to speak at about 9:00 o'clock P.M. Monday, May 12th (693) and continued for about an hour and a half.

Caminito's statement was then read into evidence after the Court had overruled an objection that it was as a matter of law involuntary. He said: He and Noia had been talking and Noia had advised him to tell the truth about the killing (710). He thus described the homicide details: He, Bonino and Noia had met in a restaurant about 7:30 in the evening (713) and had gone in Caminito's car (which was, however, equipped with Noia's license plates (714) on a "stick up" (716) to get money, as Caminito put it, "illegally" (717). At the scene, he remained in the car while Noia and Bonino left. He heard a shot and then they came running back and told him to "just beat it" (723). They did not answer his question as to what had happened. He took them to a Brooklyn street and then went to his own home (725). He did not see any part of the robbery or of the shooting, but did hear shouting as he was turning the car from the scene (726). (It will be remembered that the witness Weiner had spoken of a U-turn made by the fast-disappearing car with squealing tires (143, 144).) He did not know how the gun had been disposed of (728). He was upset "because I knew a man got hurt", that the man had been shot (732). Nevertheless, he then went with his wife to the movies and to a restaurant and returned to sleep (734). Noia and Bonino never discussed the shooting with him (735) until the day of their questioning. At that time "they cursed that they didn't get anything" (737).

Detective Anna C. Orr arrived at the precinct on May 12, 1941. She first conferred with Capt. McGowan (794) and then went into the room where Noia was (795). "I just stood there facing the defendant Noia and I was asked questions and I answered the questions" (796). The questions related to the details of the February 15th killing. She identified Noia as having held the gun (800). As she had not seen the occurrence (801), her answers were not factual but were made in accordance with police planning. She next went in and repeated the performance with Bonino, and finally with Caminito: him, she had seen sitting in the car. The defendants were not told that she was a detective (804). When she identified them, none made any statement in her presence (810).

Detective Margaret Tietze made a similar fictitious identification under instructions from her superior, Capt. McGowan (817, 820). Again the defendants made no statements (822).

Detective Eugene Gavin (838) enacted the same performance and with respect to Caminito stated in his presence that Caminito "was at the wheel of the car" (846). To him also Caminito said nothing (851).

John A. O'Sullivan, a District Attorney stenographer, made the record of the defendants' statements to Assistant District Attorney Heffernan on May 13, 1941 (863). He was examined on a preliminary *voir dire* by respondent's counsel; and, after a denial of the motion to exclude the statements on the ground that they had been involuntarily obtained, they were read in evidence.

Caminito* told Mr. Heffernan that he and his co-defendants had met at a luncheonette on February 15, 1941 between 7 and 8 o'clock in the evening (941). Noia suggested: "Let's go out and make some money", *which Caminito understood to mean that they should steal the money* (943). He drove them in his blue sedan (945) which was equipped with Noia's plates (946). It was his intention *"to take part in this stealing of the money"*; he *"went with them to do whatever job they were going to do."* They rode around a while and then the two co-defendants alighted from the car. Some minutes later, he heard a shot and they came running back (948). The reason for their haste was no mystery to Caminito: "I figured a man got shot, because they told me to beat it and a man shouted 'Stop them, stop them'" (949). He was able to depart immediately because "while Bonino and Noia were out of the car, he had kept the motor running". He did not learn of the death of the victim until the night of his arrest (952). *He told Mr. Heffernan that he had been treated "all right" by the police; that he was making the statement of his own free will and without promise or force* (955).

Detective Edward Mitchell testified that he brought Caminito to the precinct about 8:45 P.M. on Sunday, May 11th (970). Although the three defendants were questioned from then until about midnight, *the questioning was not continuous* (975). Each defendant was questioned *separately* and during the process there were interruptions for the purpose of bringing defendants in and out of the Cap-

* We do not deem it necessary to refer in this petition to the statements of Noia and Bonino. They are printed at folios 882 *seq.* and 916 *seq.*

tain's office (976). *At midnight, the defendants were given food* (977) and the resumed interrogation did not continue more than an hour and a half (and probably less than that) when they were placed in cells. The questioning the next morning did not begin until after noon (982). The incident with the female detectives Tietze and Orr occurred about 1 o'clock (986) and about 2 o'clock in the afternoon Noia had the conversation with Manes (987) (during which he signified his willingness to confess, but asked for an opportunity first to talk to his co-defendants (520)). It was about this time that, with short intervals between, Bonino and Caminito went into the Captain's office.*

Lieutenant John J. Meenahan, in charge of police action in the case (1032), first saw Caminito at the precinct some time after 8 o'clock in the evening of Sunday, May 11th (1034). He questioned Noia and then Bonino; and last Caminito. The questioning of all three continued *separately* until about midnight (1035) when the defendants had food. The interrogation was resumed until 2 o'clock in the morning (1036) when the three suspects were put in cells in different precincts (1037). Caminito was fed in the morning (1038). The separate pretended identifications by the female detectives occurred after

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* We give this testimony as to time intervals with such detail because we are certain that they negative the assumption of fact which was one of the major bases for the action of the Court below. Thus Frank, *J.* says (p. 707): "The police interrogated him almost continuously for 27 hours, with but a brief interval for rest in a cell so badly equipped as to make sleep virtually impossible for a man already harried by the questioning." The record makes it obvious that the questioning was not continuous and in its actual duration was for a period far less than 27 hours.

1 o'clock in the afternoon (1041 *seq.*). Noia and Manes then went to an upstairs room and after an interval returned to Meenahan. Noia told the Lieutenant: "He wanted to tell the truth about the whole thing, but, he said, 'I do not want the other two to think I am a rat.' He said, 'Give me a chance to talk to them and I will get them to talk about themselves'." He was accorded this opportunity and spoke to his accomplices alone for about three-quarters of an hour (1050). They were then *separately* questioned by Capt. McGowan after the arrival of a police stenographer. The examinations "took from about 6:00 P.M. to around 11:30 P.M." when, upon the arrival of Assistant District Attorney Heffernan and his stenographer, the process was repeated until about 2 o'clock in the morning. (We stress the fact that the admission of guilt was actually made long before even 6 o'clock, when the first stenographic recording began. What occurred from 6:00 P.M. until 2:00 A.M. was in essence a procedural act necessary for the recordation and preservation of the confessions but in no sense part of the process of eliciting the admission of guilt. It is, we submit, further proof of the inaccuracy of Judge Frank's assumption concerning the "harassment" by 27 hours of "continuous interrogation.")

Under cross-examination, Meenahan stated that he had seen people in the precinct whom he knew to be family or friends of the suspects, but he himself had not spoken to them. They did not see the defendants (1064). He also knew that an attorney, Spano, was at the precinct inquiring for the defendants (1069). Spano did not see them until they were arraigned (1071). He saw no violence per-

petrated (1080) and made no threats himself (1082); nor did he hear or see others use threatening language or make threatening gestures (1087, 1109, 1113). *Although the cells in which the defendants slept Monday night had no bed, pillow or blanket, they were identical with all other cells in the precinct* (1089). He made no threats to arrest the members of the defendants' families (1092). The interrogation in the afternoon of Monday, May 12th, was interrupted by a conference among the defendants of over an hour's duration (1098). The Night Court was open on Monday, May 12th.* He did not tell the defendants to repeat to the District Attorney the "story" they had told in the presence of the police stenographer (1115).

Further illumination of the non-existent "harassment" and "continuous interrogation" referred to by Frank, *J.* is found in this testimony by Lt. Meenahan (1121): "Like after I would speak to Bonino, have a conversation with him for twenty minutes, then maybe something that Bonino had told me in his absence, then I would ask him about questions that Bonino had said, and the same with Caminito, and it was the three of them. Just after I talked to Noia, I would talk to him about something Bonino told me and to Caminito the same way."

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* The question concerning the night court was, of course, asked by defendant's counsel in order to highlight the claim of illegality of non-arraignment on Monday evening, May 12th. In fact, however, the functioning of the Night Court was completely irrelevant to this case. That court is restricted in its jurisdiction and practice to the hearing of misdemeanor cases and was so restricted in 1941. Moreover, and of the utmost importance in the consideration of this problem is the fact that the Felony Court has since the time of its creation never held night sessions. Arraignments are held only in the Felony Court.

"By the Court:

Q. That is, you would use what one man told you in questioning the other man? A. That's right."

CAPTAIN JOHN J. MCGOWAN, Commander of the Brooklyn Homicide Squad (1160), first came in contact with the suspects on the morning of May 12th before noon. After a conversation with them, he sent for two policewomen and upon their arrival *two or three hours later*, gave them instructions which resulted in the pretended identifications (1165-1168). Noia then admitted his participation in the crime "and he wanted to tell the truth about it, but he did not want to be a rat and that he wanted to have an opportunity to talk to the other men" (1170). Noia spoke to Manes alone for almost an hour (1171). The other two participants were then alone for another hour with Manes, at the end of which time they admitted their guilt: "They said they were willing to tell everything as to how the murder was committed." The police stenographer was sent for and a separate statement was then taken from each of the three: "Yes, I took each one separately and brought them into the room and asked them certain questions and the stenographer recorded those in his book." (Here we find further indisputable proof of a curious judicial time-elison in Judge Frank's statement of, and reliance on, "continuous interrogation" for 27 hours. The admissions of guilt by Caminito and his cohorts had been *earlier* made and guilt thus established. The subsequent questioning by the Police Captain from 6:00 o'clock in the evening until 10 or 11 o'clock at night (1172) and by the Assistant District Attorney thereafter until 2 o'clock in the morning (1173) was solely for the purpose of making the record.

Insofar as any mental coercion is concerned, therefore, these later hours cannot with any reasonableness be deemed to have been part of any coercive process.)

Defendant's counsel then moved to strike out the confessions on the ground that each had been involuntarily made. The motions were denied, as were motions to strike out the testimony of the female detectives and of Gavin concerning the pretended identifications.

The Defense: Bonino

Dr. John Sperando, employed by the New York City Department of Correction and assigned to the Raymond Street Jail, testified that Bonino had at the time of his admission to jail, complained of an ear injury (1223-1227). There were no external signs of injury, Bonino merely claiming that "he had a certain amount of tenderness" (1228) of which, however, the doctor could find no sign. He treated Noia who had a large bruise on the right thigh, some contusions of the scalp and of the lower posterior chest wall (1242). Noia complained of pains in the stomach, but there were no external signs of injury in that region (1224). *Notably, no proof was offered of any complaint by Caminito of physical injury or illness at the time of his admission to the jail or during his stay in that institution.*

Joseph Spano, an attorney, went to the station house early Monday morning, May 12th (1299) and met relatives of the defendants. Although he made himself known in his professional capacity to a detective (1301), he saw none of the defendants. The next morning they were not present in the Felony Court (1305). He was unable to

procure any information at the District Attorney's office (1301). He visited the station house on May 12th twice and was informed that the arraignment in the Felony Court would probably take place the next morning (1314).

Mr. Spano's cross-examination was not helpful to his clients. Thus, he testified that *although he entered a plea of not guilty for them* (1317) *and conferred with them in the Felony Court* (1326), *he did not make complaint in their behalf to the Magistrate with respect to any allegation of improper treatment* (1327), *nor did the defendants themselves do so* (1330).

Bonino's defense, as made in his own testimony, was an alibi. On February 15, 1941, his family had moved to a new apartment and he was busy that whole day in the process of transferring and arranging the household effects. He did not leave the apartment until 10:30 in the evening. He was not at the scene of the killing and had no part in it (1403), nor had he and the other defendants agreed to commit or participate in a hold-up on that day (1407). In the precinct he was subjected to numerous beatings, threats and other mistreatment (1418 *seq.*). He was given no food and was compelled to lie down in a cell without pillow or blanket, although it was cold. He did not sleep all night (1432). He first had food in the morning (1433). Lt. Meenahan threatened to arrest his whole family. He was identified on Monday afternoon by two women and a male detective (1440). Caminito and Noia told him of threats which had been made against their families by the police. They told him also that detectives had beaten them (1449). It was after this experience that on Tuesday, May 12th, he made the admissions

contained in the statement to the police (1455). It was the threats to arrest his family and his fear of continued beatings which induced the confessions (1462) which were false and made only because of the detectives' promptings. *It is to be noted that Bonino in response to a question from his attorney:*

> *"Now, did you see any detective do anything to the defendant Caminito at any time?" Answered, "No, sir"* (1469).

It is also notable with respect to his own defense that in response to an answer by the Court and despite his previous description of mistreatment by the police, he admitted that he had been struck by only one detective, and that, in the ear (1468-1470).

Bonino's entire defense of alibi was, we submit, effectively demolished in the minds of the jury when under cross-examination, he conceded that although he had had an opportunity when questioned by Capt. McGowan and Mr. Heffernan to assert his alibi with respect to the moving of his family to the new apartment, he did not do so (1479).

The Defense: Caminito

Caminito presented various members of his family to testify (1) that his automobile was used on the night of February 15th by a brother (1503 *seq.*), and (2) that Caminito was that evening in their company at a moving picture theatre (1528, 1563, 1598, 1661).

He denied any participation in the hold-up and killing of Hammeroff (1696). On February 15, 1951, he had neither seen nor ridden in an automobile with either of

the co-defendants. In the evening after dinner, he and members of his family went to a luncheonette and then to a moving picture theatre (1701 *seq.*). He was arrested by Kenny on May 11th at about 7:30 P.M. while in his car. The detective took him first to a restaurant (1707) and then to the police station where he found Noia (1710). Lt. Meenahan arrived at about 9:30 P.M. and began to question him about a killing on Stilwell Avenue. When he denied complicity or knowledge, Manes hit him twice (1715) in Meenahan's presence. Meenahan left for about 15 minutes during which time Manes threatened him (1718). Meenahan returned and threatened to arrest Caminito's wife and Manes again threatened to beat him (1719-20). The questioning by Manes and Meenahan continued until midnight (1721), with Manes intermittently threatening him. At that time Noia arrived, limping, and explained his condition thus: "I just got kicked around a little bit" (1724). Bonino was brought in and he complained that his hair had been pulled (1726). Bonino and Noia denied to Caminito any complicity in the crime. Later on, Meenahan threw him against the wall (1728). Then Capt. McGowan arrived and questioned him until about 2 o'clock in the morning during which time Caminito continued to deny participation or knowledge. He was then locked in a cell with Noia. He had had nothing to eat until then, nor was he given anything to eat before retiring (1732). In the morning, he was brought back to Capt. McGowan's office where he continued his denials. After McGowan left, Manes called him dirty names (1737) and slapped him. McGowan returned and gave him a detailed portrayal of how his friends were supposed to have committed the crime (1740). McGowan charged him

with driving the car which Caminito denied. He was then locked in a cell by himself, still without having eaten. The cell was very cold, without bed or blanket and he was unable to sleep (1742). At 9 o'clock the next morning, Meenahan suggested to him that he admit the killing, but claim that it had occurred accidentally during a robbery and without any intent by him to kill (1746). Nevertheless, he again denied complicity. Detective Ruocco with whom Caminito was acquainted "from my neighborhood" (1747) urged Caminito to confess and warned him that otherwise "they will kick him around here until they put him in a hospital and then nobody will come near you and no one will be able to see you or anything" (1750). Caminito, however, persisted in his denials even though Meenahan (1753) and Manes (1754) threatened him with physical harm (1758). (Caminito's description of Manes' demeanor would do credit to a Hollywood horror scenarist: "gritting his teeth".) Then came a young woman who said she had seen him on Stillwell Avenue in a car on February 15th (1760). She was followed by an elderly woman who said that he was "the man". A detective also made an identification (1761). Despite all these acts, he continued his denial. He was beginning to get a headache, not having eaten up to this time (Monday at 3 P.M.), but Manes refused his request for an aspirin (1765). Capt. McGowan again pressed him to make a confession but even now at 6 o'clock,—and even later at 8 o'clock,—up to which time he still had not eaten, he repeated his denials (1776). (Manes now threatened him again. It is interesting, if not helpful, to speculate why, with all of the other detectives available, Caminito persisted in casting Manes as the *bete noir* of the police performance.) At 10:30

o'clock, he was sent in to another room to see Noia, who was crying (1779) because of threats that his wife would be arrested and because "I have been beat up so bad I cannot move". He showed Caminito a bruise on his leg and said that he had been kicked in the side by two detectives while another held him by the hair (1781). It was at this point that the first break in the defendants' denials came: Noia suggested to Caminito that in order to stop the beatings, they "give them the same story they gave us" (1783) (referring to the police) and later, after seeing a lawyer, repudiate it. Noia engaged to procure Bonino's acceptance of the plan (1784). Caminito agreed and they rehearsed between them the details given them by the police, sufficiently to make a statement to Capt. McGowan and his secretary (with Meenahan off the record from time to time suggesting answers (1787 *seq.*)). His sole, and real, reason for making the statement (1788) was "I gave those answers for fear, because I was getting beat. They were pulling my hair. They did not want to give me anything to eat. They would not let me notify my family * * *" (1788). Meenahan instructed him to make the same answers to the District Attorney (1789). Then, and only then, was he given some food. Mr. Heffernan arrived while he was having coffee and he made the same answers to him as he had given to Capt. McGowan (1792).

We are confident of the accuracy of our estimate of Caminito under cross-examination that he did not fare well. Thus, despite his lurid description of continued violence over a period of many hours, he conceded that Manes was the only one who had struck him and thus described that violence: "Manes, all in all pulled my hair three times and blows, he hit me, slaps, this way and that way,

say around eight times" (1807). Meenahan hit him once, but "I would not say he messed me up". However, a photograph, taken by a newspaper photographer (1811) after Caminito had made his statement to Mr. Heffernan, was objected to by defense counsel. It was then shown to the jury. From this it may be fairly inferred that the photograph showed the defendant to have then been in good physical condition. *This violence, such as it was, did not lead him to confess, nor was he induced to confession by the threats to arrest his wife* (1821). *It was his conference with Noia which led him to admit the commission of a crime of which he was innocent* (1822). *Although in most details, the confession was suggested to him by the police, the statement which he made in the particulars about to be given "was all in your own mind"* (1826). *Nor was that an immaterial statement. On the contrary, he admitted by it that he knew when he entered upon the journey that it was for the purpose of a stick-up.* Again, his whole story concerning the use of Noia's car plates came from his own mind (1827). So also, the police did not suggest to him his answers about the time of the commission of the murder (1832) and various other details of his recital of the crime (1837 *seq.*). He admitted to the Court that he had no belief in the promise of the officer who told him that "You are going to go home and he was going to let you off if you confess to this murder" (1842). Although he knew that Mr. Heffernan was the District Attorney, he made no complaint to him of mistreatment, but on the contrary affirmed the proper treatment by the police (1860) and that his statement to Mr. Heffernan was being made of his own free will (1862). He did not tell Mr. Heffernan that the confession was a forced and false

one (1863) nor did he complain to the Judge in the Felony Court (1872). All this, despite the fact that he knew the penalty for murder (1884).*

The Defense: Noia

Noia did not take the stand. Instead, his brother-in-law, Ernest Cropanese (1888), Mrs. Cropanese (1990) and Jennie Noia, defendant's wife (1935), testified to an alibi involving their presence with Noia on the evening of February 15th at a moving picture theatre, where they all remained until midnight.

People's Rebuttal

LEROY JAKOB, a press photographer (1976), took a photograph of the defendants at the station house (after the arrival of the District Attorney (1970)) which, it is clear, showed them to have been unmarked by physical violence (1971).

CAPT. JOHN MCGOWAN denied that either he, or any other police officers in his presence, subjected the defendants to physical violence or threat of arrest of their family, or to insulting language (1983-1988).

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* In Note No. 6 of his opinion, Judge Frank writes: "The State makes much of the fact that as to one single item of the confession, he testified that he had made it up without prompting." With great deference to the learned Judge, we submit that Caminito's admission as to non-prompting goes far beyond "one single item of the confession". His cross-examination shows that the entire confession came out of his own mind and knowledge. It may well have been true that his confession corresponded substantially to the statements made to him by the police; but this was due to the fact that police investigation, together with Noia's preliminary admissions after confrontation with the policewomen, had already put the police in full possession of the details. To use the term "one single item of confession" is, we submit, to limit the record by the limitations of a point of view.

Assistant District Attorney Edward A. Heffernan interrogated the defendants (1991), all of whom gave statements voluntarily (1994) after "they knew who I was".

James McNicholl, an employee of the New York City Department of Correction, assigned on May 13, 1941 to the Felony Court and in charge of the detention pen there, testified that when Caminito was received, he responded to a question by Mr. McNicholl that "He was O.K., no marks" (2027).

James R. Cheathan, an employee of the New York City Department of Correction, assigned on May 13, 1941 to the City Prison in Brooklyn, gave similar testimony concerning Caminito's reception at the jail (2033, 2042); the records of the jail corresponding to the records of the Felony Court in that he was "O.K." and did not need a physician (2042).

Det. A. Ruocco testified that he had seen Caminito at the station house on May 12th, and had him given some coffee and cake (2048). Later that day he gave Caminito a sandwich and coffee (2050).

Detectives Manes (2054), Kenny (2060) and Lieutenant Meenahan (2056), denied any violence or threats against Caminito (2054).

Detective Gilhuley, the police stenographer, testified that the answers given by the defendants in response to questions by Capt. McGowan had not been suggested or supplied by any of the police officers present (2061).

The People and the defendants then rested. The Court denied defense motions to strike out the confessions because they had been involuntarily obtained (2069).

The Court's Charge

In the particulars germane to this appeal, the trial Court charged the jury fully and properly under both State and Federal law. A synopsis thereof follows:

(1) The Court charged the jury that the confessions were the sole evidence against the defendants:

> "They say the only evidence adduced which connects the defendants with the commission of this crime is the alleged confession made by each one of these defendants. It is true, gentlemen, that if those confessions are not true, if the facts therein contained are not true, or if the confessions were obtained in violation of law, and you must disregard them, then there is no case against any of these defendants" (2179).

(2) The Court read the provisions of Code Crim. Pro. §395, prohibiting the receipt in evidence of a confession made under the influence of fear produced by threats, or upon a stipulation of the District Attorney that he shall not be prosecuted therefor (2180); and then made the point that the burden lay upon the District Attorney to prove beyond a reasonable doubt that the confessions were free of these taints (2183). Since the testimony by the defendants was contradicted by that of the police officers as to both force and threats, the Court left the question of fact involved to the jury (2184).

(3) The Court charged the jury that pretext and deception were used by the police to help elicit confessions when the two female and one male detective confronted the defendants. The Court (2187-2188) also properly charged that

> "A confession obtained by deception is none the less admissible in evidence as long as the deception

used was intended to induce the defendant to tell the truth and not to confess guilt when there was no guilt. The law is well settled that the fact that a confession has been procured by deceptive practice is not sufficient to justify withholding the confession from the consideration of the jury, nor would it act to prevent a jury from basing a finding of guilt thereon if it was not open to any other objection."

i.e.,

"* * * as long as it is voluntarily made, that is, made not under the influence of fear produced by threats."

(4) The Court gave the jury in clear terms the requirements of Code Crim. Pro. §165 that a defendant "arrested must in all cases be taken before a Magistrate without unnecessary delay—without unnecessary delay." In amplification, indeed, the Court went beyond the requirements of law when it charged the jury that:

"Any unnecessary delay on the part of the police to arraign a prisoner before a Magistrate is prohibited and when unexplained or when unsatisfactorily explained by the prosecution, such delay may create an inference favorable to the defendant."

The proper legal charge then followed that:

"Such prohibited detention of the accused has a bearing upon the disputed question of the voluntary or involuntary character of defendant's confession made while in the delayed custody of the police before arraignment, but that, gentlemen, does not necessarily imply that such a confession, just because of the unnecessary delay of defendants' arraignment, must therefore have been involuntarily

made, that is to say, made under the influence of fear produced by threats. An unnecessary delay although prohibited by the provisions of Sec. 165 of the Code, does not exclude a confession, but may or may not affect its voluntary or involuntary character when considered with all the other evidence referring to this subject matter in question."

The nub of the instructions lay in the following charge:

"Of course, thirty-six hours delay, if unexplained, if not satisfactorily explained, is a violation of this section of the Code, Section 165. If you find in this case evidence which shows that there was a delay which was unnecessary before arraigning these defendants, you may consider that on the question as to whether or not the confessions were voluntary or involuntary, but that does not establish of itself the absolute fact that the confessions were involuntary. You may consider that fact of delayed arraignment in considering whether or not on the whole evidence the confessions were made voluntarily. Of course, the burden is on the prosecution, The People, to prove to your satisfaction beyond a reasonable doubt that these confessions were voluntarily made pursuant to Sec. 395 of the Code of Criminal Procedure" (2190-2193).

Defense counsel made a number of requests for additional charges on the question of involuntary confessions. Some were granted, and others denied on the ground that the instructions had already been given in substance, if not in the language of the requested additions. It is respectfully submitted that this Court will be impressed with the complete fairness and accuracy of the trial Court's procedure (2221-2235). The exception taken to the charge

with respect to the deceptive practices of the police in eliciting the confessions was not founded in law (2250).

This Court has ruled that State Courts have power and discretion to determine the wording of instructions upon the involuntary character of confessions; and if such instructions fairly raise the question, the requirements of due process are satisfied. *Lyons* v. *Oklahoma,* 322 U. S. 596, 88 L. Ed. 1481.

Proceedings in the Court of Appeals*

On the question of the voluntariness of the confession, respondent's brief in the Court of Appeals claimed error in the refusal of the trial Court to rule as a matter of law that the confession was illegally obtained and involuntary. It was urged that an acquittal should have been directed. As a subsidiary point, it was argued that respondent should have been accorded "the opportunity to offer evidence that his confession was not voluntary before admitting the same in evidence." On this latter question, the record satisfied the Court of Appeals that (1) before the confessions were actually offered in evidence, defense counsel requested and received permission to examine the witnesses on the *voir dire* (681-698; 867-876); (2) at the point when it was proper for the defense to offer independent evidence of the involuntariness of the confession, no such offer was made. Moreover, the record discloses that the doctor whom the defense first offered (488) as a witness was later called during the presentation of Noia's and Bonino's defense (1218-1280) and significantly

* The brief for appellant in the Court of Appeals was identical with that in the Appellate Division. We, therefore, make no analysis of the brief in the latter Court.

was not asked a single question concerning any marks or bruises on Caminito's body or any complaints made by him. Therefore, in no event did Caminito suffer by reason of the procedure adopted by the trial Court. In respect to this feature of the case, it lies within the province of State Courts to determine all questions of procedure in the trial of the ultimate question of voluntariness of the confession; and if the procedure gives fair opportunity to try out the question, the requirements of due process are satisfied. *Lyons* v. *Oklahoma, supra.*

ARGUMENT

POINT I

The confessions to the police and the District Attorney were properly received in evidence. The judgment of the Circuit Court of Appeals was, therefore, erroneous.

Respondent's contentions in the Federal Courts have been identical with his arguments in the State Court. They are that his rights to due process under the applicable provisions of the Fourteenth Amendment to the Federal Constitution were violated by the admission into evidence of the confessions made by him because of the fact that:

(a) He maintained his innocence for a period of 27 hours;

(b) The police officers violated the State law in failing to take him for arraignment before a Magistrate without unnecessary delay and for a period of forty hours;

(c) He was intensively questioned for many hours by numerous police officers;

(d) He was held incommunicado for forty hours and during this period prevented from seeing members of his family and a lawyer;

(e) He was subjected to physical torture by being kept overnight in a cell without proper sleeping facilities;

(f) He was subjected to psychological pressure by being confronted by three detectives not known to him to be such who made false and pretended identification of him as a participant in the crime;

(g) There was no evidence of his participation in the crime other than his confessions.

The affirmance of the judgment of conviction by the State Court of Appeals and the dismissal by the District Court of the petition for a writ of habeas corpus left respondent with but one recourse in the United States Court of Appeals, of which he availed himself in full measure and with complete success: To contend that the jury which found him guilty, the Court of Appeals of the State of New York and the Federal District Court all erred so completely in their treatment of his confessions that the Circuit Court of Appeals, sitting in fact as a jury must reverse.

The error of the Court below, we submit, is that it disregards the decision of this Court in *Stein* v. *New York*, 346 U. S. 156:

> "Since these convictions may rest in whole or in part upon the confessions, we must consider whether they are a constitutionally permissible foundation for a finding of guilt."

Inquiries on which this Court must be satisfied are: (1) Under what circumstances were the confessions obtained? (2) Has the use of the confessions been repugnant to 'that fundamental fairness essential to the very concept of justice'? Lisenba v. California, 314 U. S. 219, 236, 86 L. ed. 166, 179, 62 S. Ct. 280. The first is identical with that litigated before the trial court and jury. The second is within, if not identical with, those questions considered by the state appellate court. As to both questions, we have the identical evidence that was before both state courts. At the threshold of our inquiry, therefore, lies the question: What, if any, weight do we give the verdict of the jury, the rulings of the trial judge and the determination of the state appellate court?

Petitioners' argument here essentially is that the conclusions of the New York judges and jurors are mistaken and that by reweighing the same evidence we, as a super-jury, should find that the confessions were coerced. *This misapprehends our function and scope of review,* a misconception which may be shared by some state courts with the result that they feel a diminished sense of responsibility for protecting defendants in confession cases.

Of course, this Court cannot allow itself to be completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding. *But that does not mean that we give no weight to the decision below, or approach the record de novo* or with the latitude of choice open to some state appellate courts, such as the New York Court of Appeals. Mr. Justice Brandeis, for this Court, long ago warned that the Fourteenth Amendment does not, in guaranteeing due process,

assure immunity from judicial error. Milwaukee Electrict R. & Light Co. v. Wisconsin, 252 U. S. 100, 106, 64 L. ed. 476, 480, 40 S. Ct. 306, 10 ALR 892. *It is only miscarriages of such gravity and magnitude that they cannot be expected to happen in an enlightened system of justice, or be tolerated by it if they do, that cause us to intervene to review, in the name of the Federal Constitution, the weight of conflicting evidence to support a decision by a state court.*

It is common courtroom knowledge that extortion of confessions by 'third-degree' methods is charged falsely as well as denied falsely. The practical problem is to separate the true from the false. Primarily, and in most cases final, responsibility for determining contested facts rests, and must rest, upon state trial and appellate courts.

A jury and the trial judge—knowing local conditions, close to the scene of events, hearing and observing the witnesses and parties—have the same undeniable advantages over any appellate tribunal in determining the charge of coercion of a confession as in determining the main charge of guilt of the crime. *When the issue has been fairly tried and reviewed, and there is no indication that constitutional standards of judgment have been disregarded, we will accord to the state's own decision great and, in the absence of impeachment by conceded facts, decisive respect.''* (Italics ours.)

In the District Court, Foley, *J.* properly followed the spirit of this decision in a procedure authorized by this Court in *Brown* v. *Allen,* 344 U. S. 443. Since respondent offered no new evidence touching on the issue of voluntariness of his confessions, Judge Foley decided the question by careful study of the record on appeal in the State Court.

He accorded that record the weight to which the Supreme Court held it to be entitled when in *Brown* v. *Allen*, that Court wrote:

> "So far as weight to be given the proceedings in the Courts of the State is concerned, a United States District Court, with its familiarity with State practice is in a favorable position to recognize adequate State grounds in denials of relief by said Courts without opinion. A fortiori, where the State action was based on an adequate State ground, no further examination is required, unless no State remedy for the deprivation of Federal constitutional rights ever existed (citing cases). *Furthermore, where there is material conflict of fact in the transcripts of evidence as to deprivation of constitutional rights, the District Court may properly depend upon the State's resolutions of the issue.* Malinski v. New York, 324 U. S. 401, 404, 89 L. Ed. 1029, 1932, 65 S. Ct. 781. In other circumstances, the State adjudication carries the weight that Federal practice gives to the conclusion of a Court of last resort of another jurisdiction on Federal constitutional issues. It is not res adjudicata." (Italics ours.)
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> "The decisive and serious responsibility of compelling State conformity to the Constitution by overturning State criminal convictions, should not be exercised without clear evidence of violation."

Nor is there any doubt that he fulfilled his responsibility by examining the record of the trial with meticulous attention to every detail. Such care and scrutiny is revealed by every line of his opinion and justifies his holding that:

> "The completeness in presentation of the constitutional issue involved obviates the repetition of testi-

> mony that was given at the trial in 1942, and in my judgment the interests of justice would not be served by further hearing and oral testimony."

It is our position that Judge Foley was eminently correct when he concluded that:

> "The reading of the record will not allow me the drastic conclusion that the State procedures of New York, fairly and consistently established and used in regard to the issue of such confession, were conducted so differently, unreasonably and unfairly during the trial of the relator as to constitute violation or impairment of constitutional guarantees."

The question presents itself: Why did the Circuit Court of Appeals, on exactly the same record of trial, reach a diametrically opposite result as to the facts? What is even more puzzling is the question: why did Frank, *J.* subject the Appellate Division and Court of Appeals of the State of New York to the critical opinion which he must be deemed to have accorded them in his statement:

> "Why the upper New York Courts did not reverse the conviction we do not know, as they filed no opinions."

This is at best a rhetorical question and unnecessary in the consideration of the problem because the answer is patent: The major question presented to the State Court of Appeals—indeed, the only question of substance which required their decision—was whether or not Caminito's confessions had been obtained from him by any means reprobated by the law and rendering their use on the trial unconstitutional. The State Courts did not reverse

the conviction because they reached the conclusion from the record of the trial that none of the respondent's constitutional rights had been violated. Implicit in Judge Frank's comment is a criticism of a great Court which did not deserve such stricture. The Court included as its Chief Judge, Lehman, and among the other members, Loughran, Lewis and Conway, later to become Chief Judges of the Court, and Rippey, Desmond and Thatcher. These were all eminent jurists whose devotion to the principles of constitutional liberty is proved by their opinions in many notable cases. It would, we submit, have come with more grace if Judge Frank had said, as did Chief Judge Clark in his concurring opinion, that

> "* * * I can respect the views of the State Judges as rationally developed even though I must disagree."

The ultimate question, therefore, is one of accuracy of judgment: In reviewing the same record was the State Court of Appeals accurate in its conclusion that the confessions were voluntarily made, or was the Federal Circuit Court of Appeals accurate in its conclusion that the confessions were involuntarily made? It is not, we concede, determinative that seven Judges of the State Court of Appeals (as well as five Judges of the Appellate Division) were unanimously of one opinion whereas three Judges, only, of the Federal Court of Appeals were unanimously of a contrary opinion. Nevertheless, the administration of the criminal justice is not a mechanical matter, with conclusions to be mechanically arrived at. In the last analysis, it depends upon human judgment; and that being so, the opinion of the seven Judges of the

States Court of Appeals was, we submit, entitled to and did not receive from the Circuit Court, that "great and, in the absence of impeachment by conceded facts, decisive respect" which the Supreme Court itself feels bound to give to the judgments of State Courts. *Stein* v. *New York, supra.*

The problem raised by the Circuit Court's reversal becomes all the more complicated and to us, at least, impossible of comprehension when there is noted the basis upon which that judgment was rendered. Thus, Judge Frank eliminates from consideration a number of the factors upon which respondent's able counsel based the claim of unconstitutional coercion (p. 700):

> "Alone or together, neither the unlawful detention for many hours, nor the deceit in confronting Caminito with disguised police officers who lied in identifying him would suffice to vitiate the confessions as unconstitutionally obtained."

In this, of course, he but followed the established law as to trick or deception. *People* v. *White,* 176 N. Y. 331, 339; *People* v. *Scott,* 195 N. Y. 224; *People* v. *Buffon,* 214 N. Y. 53, 57; *People* v. *Borowsky,* 258 N. Y. 371; *Young* v. *United States,* 107 Fed. 2d 490, CCA 5th Circuit, 1939; *Commonwealth* v. *Johnson,* 372 Pa. 266, cert. den. 345 U. S. 959, 73 S. Ct. 944.

In *Young* v. *United States, supra,* the Court disposed of a similar contention of involuntariness because of deception in the perceptive ruling:

> "A confession or incriminating statement must be freely and voluntarily made, but nothing else is indispensable. A witness to one of Young's state-

ments was a federal officer disguised as a prisoner. That a deceit was thus practiced does not exclude what Young may have freely said to him. It all goes to the jury for them to consider its weight, under caution by the court, that all alleged confessions are to be scanned with care and accepted with caution."

This Court has made the same observation in *Stein* v. *New York, supra*:

"* * * That confession came at a time when he must have known that the police already knew enough from Jeppeson and Brasset as to make his implication inevitable. Stein held out until after Cooper had confessed and implicated him. Both confessions were 'voluntary', in the only sense in which confessions to the police by one under arrest and suspicion ever are. The state courts could properly find an absence of psychological coercion."

In this context it is important to note that the trial Court charged the jury that pretext and deception were used by the police to help elicit the confession when the two female and one male detective confronted the defendant. Its subsquent charge (2187-2188) on the point is, we submit, warranted in law:

"A confession obtained by deception is nonetheless admissible in evidence as long as the deception used was intended to induce the defendant to tell the truth and not to confess guilt when there was no guilt. The law is well settled that the fact that a confession has been procured by deceptive practices is not sufficient to justify withholding the confession from the consideration of the jury, nor would it act to prevent a jury from basing a finding

> of guilt thereon if it was not open to any other objection."

i.e.,

> "* * * as long as it is voluntarily made, that is, made not under the influence of fear produced by threats."

Again, Judge Frank explicitly omits as a factor in his decision the claim of physical violence, writing of it thus (p. 699):

> "Caminito testified that, before giving the confessions, the police had beaten him. As the police testified to the contrary, we shall ignore that part of his testimony."

Nor does he give full credence to Caminito's testimony that the confessions as finally made by him were but the embodiment of suggestions emanating from the constant promptings of the police. Judge Frank says (p. 701):

> "We do not rest our decision on that testimony."

On what, then, does the decision of the Circuit Court of Appeals rest? What was there in the record before it which so conclusively demonstrated the involuntary character of the confessions as to cause that tribunal to reverse the judgment of a respected Court of Appeals of a great State? The answer is given by Judge Frank when he writes:

> "Alone or together, neither the unlawful detention for many hours, nor the deceit in confronting Caminito with disguised police officers who lied in identifying him would suffice to vitiate the confessions as unconstitutionally obtained. But those factors did aggravate the following unconstitutional practices which—even in the absence of those fac-

> tors—rendered the confessions inadmissible: (a) the police interrogated him almost continuously for 27 hours, with but a brief interval for rest in a cell so badly equipped as to make sleep virtually impossible for a man already harried by the questions. (b) During this long period, the police, in effect, kidnapped him: they kept him incommunicado refusing to allow his lawyer, his family, and his friends to consult with him."

Is this summary of the record as to the time of interrogation correct in fact, and again is this psychological estimate of the effect upon respondent of his sleeping facilities a proper basis for judicial decision? Also, was the police custody, which Judge Frank terms a kidnapping, so unjustified and reprobated by constitutional law as to make it a proper basis for the Circuit Court's judgment?

With great deference to the Court below, we urge that the Court was in both aspects of its decision, in error in fact, and therefore in error in law.

Caminito definitely was not interrogated "almost continuously for 27 hours". The evidence is plenary that the first three-hour period of interrogation on Sunday evening, May 11th, from 9:00 P.M. until midnight (213) was not devoted to Caminito alone, but was concerned with all three suspects *separately*. There were, moreover, interruptions from time to time, caused by the coming and going of the interrogators as statements made by each of the three were contemporaneously being investigated. The pause at midnight (215) for coffee and sandwiches is not to be lightly disregarded, since it offered not only food to Caminito and his accomplices, but an opportunity for rest and reinvigoration. The two-hour period of questioning which followed (216) was also divided among the three suspects.

Whatever was the quality of their sleep until the next morning (and we shall deal with that phase of the case in a moment), at least they were not questioned for a period which may have lasted until 11 o'clock (507) or noon (982), and which certainly lasted until 10 o'clock (222) the next morning. By midafternoon they had had their mutual conference, had determined to admit their guilt and had already confessed to Capt. McGowan (1172). Everything which followed thereafter was but a mechanical recording of the prior admission of guilt: a recording with which no one can quarrel because of its imperative necessity for proper trial and prosecution. *In sum, not only was Caminito not interrogated "almost continuously for 27 hours", but in all likelihood the total of interrogation to which he was subjected did not approach a fourth or a fifth of that period in time.*

There was completely absent that process of investigation where " • • • without sleep or rest, relays of officers, experienced investigators, and highly trained lawyers questioned him without respite." *Ashcraft* v. *Tennessee*, 322 U. S. 143. We submit that the Court below arrived at its conclusion—and could only have arrived at such conclusion—of interrogation, "almost continuously for 27 hours", by an arithmetical calculation of beginning and terminus which was inaccurate in its result because of a complete oversimplification of process. This may be useful for the creation of epigrammatic opinion; but it is not, we believe, useful to the ultimate ends of justice in this case.

We advert to Judge Frank's criticism of the sleeping facilities afforded Caminito on the night of May 11-12.

We do not minimize the discomfort of the police cell. However, certain facts are not to be disputed. First, this was no torture chamber, especially chosen for Caminito. It was the same as all detention cells in the precinct, standard throughout the City of New York for the overnight accommodation of detainees and devoid of mattress by direction of the Department of Correction for reasons of health. Secondly, Caminito's inability "to sleep in the cell" (footnote 1 to Judge Frank's opinion), if it existed at all, was certainly much more likely due to the fact of his apprehension and imminent prosecution than to either the condition of the cell or the temperature of the night.*

Nor is there any solid legal evidence to support the conclusion, which we submit to be rather an assumption, that Caminito was unable to sleep. The opinion in this aspect is based upon an acceptance by the Court below of his testimony after it had been rejected by the jury, the reviewing State Courts and the Federal District Court. We cannot understand why the self-serving testimony of an interested defendant is thus assayed. It has been rightsaid (*Haley* v. *Ohio,* 332 U. S. 596) that "Self-serving perjury however, must not be the pass-key to a mandatory exclusion of the confession from use as evidence."

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* While the fact was not established during the trial, we have by inquiry from the United States Department of Commerce, Weather Bureau Department, ascertained that the temperature at the end of each hour on Monday, May 12, 1941 was:

1:00-2:00	51°	7:00-8:00	53°
2:00-3:00	51°	8:00-9:00	56°
3:00-4:00	50°	9:00-10:00	59°
4:00-5:00	49°	10:00-11:00	61°
5:00-6:00	50°	11:00-12:00	62°
6:00-7:00	52°		

It is our submission that to hold as did the Court below is but to venture into the relatively uncharted fields of psychology. It cannot be treated as a fact and as a fact be utilized as the basis for a finding of involuntariness. While it is unrealistic to expect a slide-rule method for determining the issue of voluntariness,* it is certainly not unreasonable for those charged with the administration of the criminal law to hope for something more definite and certain than a psychological treatise based upon a psychological assumption.

Does the law on the subject justify Judge Frank's stricture upon the police that they "in effect, kidnapped" Caminito? We submit that the law as settled by the Supreme Court of the United States and the State Courts is to the contrary. Thus, the Supreme Court has said that "The mere questioning of a suspect while in the custody of police officers is not prohibited as a matter of common law or due process" (*Lyons* v. *Oklahoma, supra,* p. 601). The question in each particular case always is whether the questioning has continued so long prior to arraignment as to constitute a prohibited and illegal delay in arraignment. As the New York Court of Appeals said in *People* v. *Perez* (300 N. Y. 208, 218):

> "If the jury might have found that defendant** was held until April 9th in violation of section 165 of

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* "No formula to determine this question by its application to the facts of a given case can be devised" (*Lyons* v. *Oklahoma,* 322 U. S. 596, 602).

** Perez was arrested on April second and "questioned almost continuously by as many as thirteen detectives, exclusive of the assistant district attorney" until noon of April third when he was committed as a material witness. He was then questioned intermittently over a period of days and did not finally confess until April eighth. He was arraigned on April ninth.

> the Code of Criminal Procedure, the charge should have been given (citing cases). Such an inference was not permissible. *While the police may have suspected defendant of the murder, they did not have enough evidence to hold him as a defendant until shortly before he confessed. His detention during this period was lawful because, in light of his admitted knowledge of many of the circumstances surrounding the murder, his commitment as a material witness was valid.*" (Italics ours.)

While Caminito was not committed as a material witness, there are other striking similarities between the cases. This Court will understand that Caminito and his confederates were not arrested on a bare police impulse or imaginary deduction. Police practice is dictated by other factors. While the record does not disclose it, there can be no question that the police had received information—quite likely from underworld sources and informers —which connected Caminito and his co-defendants with the Hammeroff murder. To the point of illegal detainer, the law recognizes the right in such a case of apprehension and questioning (*Lyons* v. *Oklahoma, supra; People* v. *Perez, supra*).

The Supreme Court of the United States has recognized the public right of detention and interrogation within proper limits. In *Stein* v. *New York, supra,* the Court said:

> "2. Psychological coercion.—Psychological coercion is claimed as a secondary contention. It is urged that admitted facts show psychological pressure by interrogation, such as to overpower these petitioners' mental resistance and induces involuntary confessions. Of course, a process of interroga-

tion can be so prolonged and unremitting, especially when accompanied by deprivation of refreshment, rest or relief, as to accomplish extortion of any involuntary confession.

"But the inquiry as to such allegations has a different point of departure. Interrogation is not inherently coercive, as is physical violence. Interrogation does have social value in solving crime, as physical force does not. By their own answers many suspects clear themselves, and the information they give frequently points out another who is guilty. Indeed, interrogation of those who know something about the facts is the chief means to solution of crime. The duty to disclose knowledge of crime rests upon all citizens. It is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness. *This Court never has held that the Fourteenth Amendment prohibits a state from such detention and interrogation of a suspect as under the circumstances appears reasonable and not coercive.*

"Of course, such inquiries have limits. But the limits are not defined merely by calling an interrogation an 'inquisition,' which adds to the problem only the emotions inherited from medieval experience. The limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing. What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal." (Italics ours.)

Nor is there any rule which requires the fruitless arraignment of a defendant merely as a matter of form before the evidence against him constitutes a case for arraignment. Were the law otherwise arraignment would

be nothing more than notification to a defendant of his status as a suspect and invitation to him to become a fugitive. What the law requires is that there be arraignment, not immediately after arrest, but reasonably thereafter, and reasonable delay includes the right to a reasonable opportunity for uncoercive interrogation. That, in the last analysis, is what here occurred.*

To speak of this episode as a kidnapping is, we submit, to indulge in a mere exercise in semantics. Nor is substance added by the further reference:

> "They kept him incommunicado, refused to allow his lawyer, his family and his friends to consult with him."

We do not dispute that the lawyer and the family were unable to see Caminito from Sunday night, May 11th, until Tuesday morning, May 13th, when they met him in the Felony Court. We do dispute that the jury, the State Courts of review and the Federal District Court were wrong in their conclusion that these circumstances did not induce a false and involuntary confession. As we have shown (p. 22 of this Petition), Caminito under cross-examination at the trial admitted that it was solely his conference with Noia which finally caused him to confess. We give his testimony *in extenso* (1819 *et seq.*):

> "Q. And the only time you had to talk with the defendants Noia and Bonino was the few minutes you had with them upstairs? A. I only spoke to Noia for about a half hour upstairs.

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* "Certainly due process does not require that charges be placed hurriedly and recklessly." *Gallegos* v. *Nebraska*, 342 U. S. 55, 73, 96 L. Ed. 87, 98. There, defendant was not arraigned for 14 days, during which time he was without counsel.

Q. And it was during your talk with him that you decided on the story that you would tell when you went downstairs? A. I did not have to decide on the story.

Q. Answer my question.

The Court: Just a second. Don't argue with the District Attorney.

The Witness: I am sorry, your Honor.

The Court: It was after that time or it was at that time that you decided on the story.

The Witness: At that time we decided on the story.

Q. And that time who was in the room with you? A. Just Noia and I.

Q. Nobody else? A. Nobody else.

Q. Up to that time you had denied any part in the killing, is that right? A. That is right.

Q. Despite the fact that you had been hit? A. Yes, sir.

Q. So you never confessed after they hit you any time, did you? A. What do you mean?

Q. When you were hit, did you ever say then that you committed the crime? A. No, sir.

Q. At no time? A. No, sir.

Q. And at no time when they said they would lock up your wife did you tell them you did it? A. No, sir.

Q. So it was not until after you talked with Noia upstairs that you came down and made this statement? A. That is right."

If the violence alleged to have been perpetrated upon him, and the threats to arrest his wife alleged to have been made, did not induce a confession, then it is impossible to believe that any other aspect of the situation such as

absence of family or counsel was of sufficient compulsion to bring about the confession.* And if the jury, the reviewing State Courts and the Federal District Court could find no basis for such conclusion in these demonstrated facts, we cannot see how in law the Court below could have made such a discovery. We submit that the decision shows a misapprehension of function and scope of review which the Supreme Court rejected for itself in *Stein* v. *New York, supra,* when it refused to become "a super jury".

The last-quoted portion of the trial record, so clearly negativing the possibility of illegal compulsion in any of the factors relied upon by the Court below, highlights an entire record which in every respect justified the decisions of the State Courts of review and the Federal District Court. In the light of such a record, proving a fair and impartial trial, during which every constitutional right of the defendant was properly safeguarded, we believe ourselves warranted in the assertion that the Court below, in reversing the other Courts, failed to heed the warning uttered by Cardozo *J.* in *Snyder* v. *Massachusetts* (291 U. S. 97, 122, 78 L. Ed. 674, 687, 54 S. Ct. 330):

> "There is danger that the criminal law will be brought into contempt — that discredit will even touch the great immunities assured by the Fourteenth Amendment — if gossamer possibility of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to a local law and set the guilty free."

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* Caminito was no "lad of fifteen" (*Haley* v. *Ohio, supra*). He was 26 years of age (1679). Nor was he illiterate (*Harris* v. *South Carolina,* 338 U. S. 68, 70).

The citation of authorities in a case such as this one is often but a useless gesture because of the differences in fact which, with their various nuances, compel a different conclusion in law. We rest content in bringing to this Court's attention its own decision in *Lisenba* v. *California* (314 U. S. 219, 86 L. Ed. 166) where the parallel is as complete as it ever can be between two unrelated cases.

In *Lisenba*, the defendant was arrested on the Sunday morning of April 19th and was questioned for about an hour concerning an incest charge not involved in the murder. In the later afternoon, he was fed at a cafe. During the night "various officers questioned him in relays". *He remained fully dressed and without sleep, sitting in a chair.* Monday morning he was given breakfast and then the questioning was resumed and continued until about three o'clock Tuesday morning. Defendant said that he fainted. Others described it as sleep. After he had breakfasted on Tuesday he was placed under arrest, arraigned before a magistrate and committed on the *incest* charge. Defendant testified on his murder trial that during the questioning from Monday evening until Tuesday morning, he was badly beaten. There was both corroboration and denial of this testimony. The state, however, did not deny that he "was repeatedly and persistently questioned at intervals during the period from Sunday night until Tuesday morning". During this period of April 19-21, he "made no incriminating admission or confession".

On May 1st, defendant's accomplice was arrested and made a statement. On May 2nd, defendant was confronted with the accomplice but refused to make any statement.

Later in that day, he was questioned by the District Attorney in his office until supper time and then, after he received some food, until later in the night. He made no incriminating answers. The state's testimony showed that about midnight, when appellant was alone with a deputy sheriff, he turned to the officer and "said something to the effect: 'Why can't we go out and get something to eat; if we do, I'll tell you the story.'" Appellant was taken to a public cafe and fed, and then confessed. He later repudiated the confession with the claim that it was merely an attempt on his part to retell the tale which the accomplice had told and "which had been constantly dinned into his ears". There were, however, discrepancies in the two stories.

A preliminary *voir dire* was held at the trial and the trial Court admitted the confession in accordance with California law (identical with that of New York). The trial Court also charged the jury "that the confessions must be utterly disregarded unless they were voluntary, that is, not the result of inducement, promises, threats, violence, or any form of coercion."

The Supreme Court found that there had been an illegal and criminal violation of the California statute requiring prompt arraignment. Denial of opportunity to consult counsel was also determined to have existed constituting a misdemeanor under California Penal Code, §825. The Court also commented on the lack of authority in taking defendant from jail to the District Attorney's office for questioning. Nevertheless, the Court limited the issue to the voluntary or involuntary character of the confessions, these other circumstances being only items to be appraised

"in determining whether the use of the confession was a denial of due process". In sustaining the conviction, the Court wrote:

> "There are cases, such as this one, where the evidence as to the methods employed to obtain a confession is conflicting, and in which, although denial of due process was not an issue in the trial, an issue has been resolved by court and jury which involves an answer to the due process question. In such a case we accept the determination of the triers of fact, unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process.
>
> "Here judge and jury passed on the question whether the petitioner's confession were freely and voluntarily made, and the tests applied in answering that question rendered the decision one that also answered the question whether the use of the confessions involved a denial of due process; this notwithstanding the issue submitted was not eo nomine one concerning due process. Furthermore, in passing on the petitioner's claim the Supreme Court of the State found no violation of the Fourteenth Amendment. Our duty then is to determine whether the evidence requires that we set aside the finding of two courts and a jury and adjudge the admission of the confessions so fundamentally unfair, so contrary to the common concept of ordered liberty as to amount to a taking of life without due process of law.
>
> "In view of the conflicting testimony, we are unable to say that the finding below was erroneous so far as concerns the petitioner's claim of physical violence, threats or implied promises of leniency.

There remains the uncontradicted fact that on two occasions, separated by an interval of eleven days, the petitioner was questioned for protracted periods. He made no admission implicating him in his wife's death during, or soon after, the interrogations of April 19, 20 and 21. If, without more, eleven days later confessions had been forthcoming we should have no hesitation in overruling his contention respecting the admission of his confessions.

"Does the questioning of May 2nd, in and of itself, or in the light of his earlier experience, render the use of the confessions a violation of due process? *If we are so to hold it must be upon the ground that such a practice, irrespective of the result upon the petitioner, so tainted his statements that, without considering other facts disclosed by the evidence, and without giving weight to accredited findings below that his statements were free and voluntary, as a matter of law, they were inadmissible in his trial. This would be to impose upon the state courts a stricter rule than we have enforced in federal trials.* There is less reason for such a holding when we reflect that we are dealing with the system of criminal administration of California, quasi-sovereign; that if federal power is invoked to set aside what California regards as a fair trial it must be plain that a federal right has been invaded." (Italics ours.)

In the instant case as in *Lisbena*, there is plenary evidence, *of record* (1819, *et seq.*) that the sum total of the treatment reprobated by the Court below failed to extort Caminito's confession, which came only after his conference with his accomplices and after realization that the police possessed full details of the crime. The parallel, we submit, between the two cases is complete.

See also:

Stroble v. *California*, 343 U. S. 180, 96 L. Ed. 872.

In the Court below, Judge Clark in his concurring opinion, wrote:

> "Since the coercion here was so much more direct and extensive than that in *Leyra* v. *Denno*, 347 U. S. 556, I agree that we must reverse on the authority of that case."

With the greatest deference to Judge Clark, we urge that there is no real parallel between the two cases; that, in fact, the great dissimilarity between them leaves *Leyra* unavailable as authority or precedent. In *Leyra*, the quantity and quality of mental pressure, exerted by a psychiatrist upon the defendant just prior to the making of his confession, was an undisputed fact since the doctor's practices had been recorded over a loud speaker on a tape recorder. The extent of the pressure was such that the Supreme Court held as a matter of law that it rendered the subsequent confessions involuntary. In the instant case (in which the Court below rejects as a basis for its determination the claim of force—as a matter of experience the most effective method of extorting an involuntary confession) it is, we submit, an unwarranted application to inapplicable facts of an otherwise commendable constitutional attitude to characterize the history of this case as something worse even than that involved in *Leyra*.

Stripped of all the adjectives used by the Court below in its description of the admitted facts they are nothing more than this: that intermittently, for a period far less than twenty-seven hours, Caminito was properly and legal-

ly interrogated by the police without violence or threats albeit in the absence of family and counsel (see *Gallegos* v. *Nebraska, supra*); that at most he was tricked into agreeing with Noia's desire to confess (brought about by the pretended identifications of the policewomen and detectives)*; and that this followed after what can at most be realistically described only as an uncomfortable night's sleep. We yield to no one in our respect for the requirements of constitutional due process; and, thus believing, we assert without hesitation that we see no justification for the Court below saying on this record, as did Judge Frank, that "all decent Americans condemn satanic practices, like those described above * * *". This is, we submit, evidence of a doctrinaire approach to the function of evaluation of testimony and not an adequate judicial weighing of facts.

Judge Frank says:

> "Any member of this or any other court, to escape such anguish, would admit to almost any crime."

This is bare hyperbole. It is certainly demonstrably inaccurate to include in this sweeping generalization the members of the New York State Courts of review and the District Court Judge who sat on the instant petition. Moreover, we submit, it illustrates the employment in the

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* "* * * confessions obviously came when they were convinced that their dance was over and the time had come to pay the fiddler" (*Stein* v. *N. Y., supra*).

"But 'The guilty flee when no man pursueth.' For three days, Gallegos refused to tell his name. But when he finally revealed his identity he went on and told all. He may have been of the impression that the authorities who were holding him knew more than they did. Only the fact that he was in custody, the fear that his deeds were known, and the weight of the crime on his conscience can be said to have coerced this confession." *Gallegos* v. *Nebraska, supra.*

judicial function of that personal attitude against which Mr. Justice Frankfurter warned when in *Haley* v. *Ohio* (332 U. S. 596, 602, 92 L. Ed. 224, 230) he wrote of the attitude of a Federal Judge when confronted with the problem of federal supervision over state criminal trials, respecting the question of due process:

> "The doubts and difficulties derive from the very nature of the problem before us. They arise frequently when this Court is obliged to give definiteness to 'the vague contours' of Due Process or, to change the figure, to spin judgment upon State action out of that gossamer concept. Subtle and even elusive as its criteria are, we cannot escape that duty of judicial review. The nature of the duty, however, makes it especially important to be humble in exercising it. Humility in this context means an alert self-scrutiny so as to avoid infusing into the vagueness of a Constitutional command one's merely private notions. Like other mortals, judges, though unaware, may be in the grip of prepossessions. The only way to relax such a grip, the only way to avoid finding in the Constitution the personal bias one has placed in it, is to explore the influences that have shaped one's unanalyzed views in order to lay bare prepossessions."

We deem it permissible to quote here the words of the Supreme Court in *Brown* v. *Allen* (344 U. S. 443, 495, 97 L. Ed. 469, 509):

> "We must not invite the exercise of judicial impressionism. Discretion there may be, but 'methodized by analogy, disciplined by system.' Cardozo, The Nature of the Judicial Process, 139, 141 (1921). Discretion without a criterion for its exercise is authorization of arbitrariness."

The result of the decision in the Court below is, of course, of great importance in its effect upon the judgment in the case. We urge that this itself sufficiently entitles the State of New York to the allowance of certiorari. There is, however, an even greater question involved in the ultimate determination of the case.

In the performance of its constitutional duty to enforce obedience to the requirements of due process under the Fourteenth Amendment, the Supreme Court has held fast to the principle (*Malinski* v. *New York*, 324 U. S. 401, 412, 418) that:

> "We must be deeply mindful of the responsibilities of the States for the enforcement of criminal laws, and exercise with due humility our merely negative function in subjecting convictions from state courts to the very narrow scrutiny which the Due Process Clause of the Fourteenth Amendment authorizes."

This has been an important element in the standard by which, without deviation therefrom, all cases have been measured in that Court whether the ultimate decision reversed the State judgment (*People* v. *Malinski, supra; Haley* v. *Ohio, supra; Watts* v. *Indiana*, 338 U. S. 49; *Turner* v. *Pennsylvania*, 338 U. S. 62; or affirmed: *Lisenba* v. *California, supra; Lyons* v. *Oklahoma, supra; Stroble* v. *California, supra; Gallegos* v. *Nebraska, supra.*

This standard is, of course, as binding upon the lower Federal Courts as it is upon the Supreme Court. They, too, are bound by the injunction uttered by Mr. Justice Frankfurter in *Watts* v. *Indiana, supra*, that:

> "Power of such delicacy and import must, of course, be exercised with greatest forbearance."

The sovereignty of the states—of greatest importance under our federal structure—should not be infringed, except upon compelling necessity and clearest proof; proof resting neither upon inference nor upon the personal *weltanschaung* of a Judge. It is our respectful submission that in the instant case the sovereignty of the State of New York has been improvidently disregarded by a decision which cannot be squared with the facts in the case and which can be accounted for only by the "grip of prepossession" (*Haley* v. *Ohio, supra*).

It is our prayer, therefore, that the writ of certiorari be allowed in order that the State of New York may in this Court have opportunity to right a wrong decision.

CONCLUSION

For all of the foregoing reasons petitioners respectfully pray that this Court issue a writ of certiorari to the United States Court of Appeals for the Second Circuit to review its judgment reversing the denial of respondent's application for a writ of habeas corpus.

Respectfuly submitted,

JACOB K. JAVITS
Attorney General of the State of New York

EDWARD S. SILVER
District Attorney, Kings County
Attorneys for Petitioners

WILLIAM I. SIEGEL
Assistant District Attorney

JAMES O. MOORE, JR.
Solicitor General
of Counsel

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SEP 23 1955
HAROLD B. WILLEY, Clerk

No. 416

IN THE

Supreme Court of the United States

October Term, 1955

UNITED STATES OF AMERICA ex rel.
SANTO CAMINITO,

Respondent,

—against—

ROBERT E. MURPHY, as Warden of Auburn Prison, State of New York and THE PEOPLE OF THE STATE OF NEW YORK,

Petitioners.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JACOB K. JAVITS
Attorney General of the State of New York

EDWARD S. SILVER
District Attorney, Kings County
Attorneys for Petitioners

WILLIAM I. SIEGEL
Assistant District Attorney

JAMES O. MOORE, JR.
Solicitor General
of Counsel

32 CASE PRESS, 30 Ferry Street, N. Y. C.—COrtlandt 7-0484-0485

United States Court of Appeals

For the Second Circuit

No. 251—October Term, 1954

Argued April 11, 1955 Decided May 11, 1955.

Docket No. 23492

UNITED STATES ex rel. SANTO CAMINITO,

Relator-Appellant,

—v.—

ROBERT E. MURPHY, as Warden of Auburn Prison, State of New York,

Respondent-Appellee.

OPINION

Before:

CLARK, Chief Judge, and
FRANK and HASTIE, Circuit Judges.

Appeal from a judgment, denying a petition for a writ of habeas corpus, of the United States District Court for the Northern District of New York, entered by Judge Foley. REVERSED.

Kaufman & Edelbaum (Maurice Edelbaum and Stanley L. Gluck, of counsel) for relator.

Edward S. Silver, District Attorney, Kings County, New York (William I. Siegel, of counsel) and Jacob Javits, Attorney General, State of New York, for respondent.

Caminito and two others, Bonino and Noia, were indicted by a New York Grand Jury for the murder of Murray Hameroff. At the trial, the State offered in evidence Caminito's signed confessions that he had participated in an attempted holdup of Hameroff as a result of which Hameroff was shot to death. The jury found the three defendants guilty of a felony murder. Pursuant to the jury's recommendation, they were sentenced to life imprisonment. Caminito and Bonino appealed. The Appellate Division (265 App. Div. 960) affirmed without opinion. The New York Court of Appeals affirmed without opinion (291 N. Y. 541), and denied a motion for reargument (297 N. Y. 882). The United States Supreme Court denied Caminito's petition for certiorari (348 U. S. 839). He then filed a petition for a writ of habeas corpus in the court below. This petition was denied. The judge signed a certificate of probable cause. Caminito has appealed to this court.

FRANK, Circuit Judge:

The sole evidence of Caminito's guilt consisted of his signed pre-trial confessions. At the trial, his counsel timely objected to their admission, and moved to strike them on the ground that they had been unconstitutionally procured; he also moved to dismiss the indictment on the ground that the State had not proved Caminito guilty. Caminito testified that the police had coerced the confessions. The trial judge left to the jury the question whether the confessions had been thus induced. The jury, by returning a verdict of guilt, found that they were voluntary.

Caminito testified that, before giving the confessions, the police had beaten him. As the police testified to the

contrary, we shall ignore that part of his testimony. But the following facts are not disputed.

(1) Caminito was taken into custody by the police on Sunday, May 11, 1941 at 6 P.M.

(2) Commencing about 9 P.M. Sunday, he was continuously interrogated by five or six police officers for a period of approximately five hours, until 2 A.M. the following morning, Monday, May 12th.

(3) At 3 A.M. on Monday, May 12th, he was locked in a cell in which there were no bed, blankets, spring or mattress, but only a wooden bench.[1] (He testified that the cell was unheated. A witness for the State testified that the cell was equipped with a radiator but that he "did not know if the heat was on" during the time Caminito was there confined.)

(3) At 10 A.M. on Monday, May 12th, the questioning was resumed. The interrogation continued all day, with several detectives taking turns.

(5) Members of Caminito's family, his friends and an attorney retained by the family, called at the station house where he was detained and tried to get information concerning his whereabouts. The police officers knew these facts, but kept him incommunicado. Other than the police and the District Attorney, no one was permitted to see him until he was arraigned forty hours after being taken into custody.

(6) During the afternoon of Monday, May 12th, two women and a man were brought in to face Caminito. He was not told that they were detectives. Each falsely pre-

1. Caminito testified that he was unable to sleep in the cell.

tended to identify him as the person who was sitting at the wheel of the automobile at the time of the shooting, which occurred in connection with the holdup.[1a]

(7) About 9 P.M., Monday, May 12th, twenty-seven hours after having been taken into custody, he signed a confession. He gave a second confession to a District Attorney a short time later.

(8) About 2.30 or 3 A.M. the following morning, Tuesday, May 13th, he was first placed under arrest.

(9) He was brought before a magistrate later that same day, more than forty hours after having first been taken into custody. The arraignment could and should have have been held long before that time. The police officers knew that the courts were open for that purpose.[2]

1a. At the trial, in his opening statement to the jury, the District Attorney said:

> "The following morning the detectives decided something had to be done if they were going to get anywhere with this case. They thereafter sent to New York for two female detectives from the Pickpocket Squad and another detective named Gavin, who they thought looked nothing like a detective, and these defendants were placed in a room and one by one these witnesses, alleged witnesses, were brought in, and they ostensibly identified these defendants as perpetrators of the crime, although they were not actually witnesses to the crime."

2. "New York City Criminal Courts Act: Sec. 101. Courts to be Held Daily in Each District.

"Except as otherwise provided in this section, there shall be a city magistrate's court held daily in every court district, and unless otherwise directed by the chief city magistrate, each city magistrate's court shall be open every day at nine o'clock in the morning, and shall not be closed before four o'clock in the afternoon, and the city magistrate assigned thereto shall be in attendance thereat except during a reasonable recess."

(10) Caminito had never been previously arrested or convicted.[3]

These facts make it clear that the trial did not measure up to the standards prescribed by the due process clause of the 14th Amendment. The confessions obtained by these loathesome means were no more evidence than if they had been forged. Absent, then, any admissible evidence of guilt, the trial judge should have dismissed the indictment or directed a verdict of acquittal. To jail a man convicted without evidence of guilt is to impose "involuntary servitude" which, "except as punishment for crime," the Thirteenth Amendment forbids. Only in Erewhon, which recognized "the crime of being maligned unjustly,"[3a] could this conviction be justified.

Alone or together, neither the unlawful detention for many hours nor the deceit in confronting Caminito with disguised police officers who lied in identifying him[4] would

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3. Although Judge Foley denied the writ, he said in his opinion:

> "Of course, there are many factors that are disturbing and cause suspicion. The holding of the defendants incommunicado, the sleeping on a hard bench without pillow or blankets in a cell probably not overheated, the failure to arraign without unnecessary delay as provided by law, the admittedly false identifications, the intensive questioning by relays of detectives—this combination together with the fact that the relator has never been arrested or convicted, would cause hesitation and suspicion on my part. So would the fact that there is little, if any, independent evidence connecting the relator with the commission of the crime."

3a. Butler, Erewhon (2d ed. 1901) Chapter 11.

4. These lies might well have reinforced the coercion in bringing about the confession. "A weak suspect, regardless of his guilt or innocence, may succumb to coercion, partly because of the apparently strong case against him." Metzler, Involuntary Confessions, 21 Un. of Chi. L. R. (1954) 317, 332 note 69.

suffice to vitiate the confessions as unconstitutionally obtained. But those factors did aggravate the following unconstitutional practices which—even in the absence of those factors—rendered the confessions inadmissible: (a) The police interrogated him almost continuously for 27 hours, with but a brief interval for rest in a cell so badly equipped as to make sleep virtually impossible for a man already harried by the questioning. (b) During this long period, the police, in effect, kidnapped him: They kept him incommunicado, refusing to allow his lawyer, his family, and his friends to consult with him.

Accordingly, the writ of habeas corpus must issue. See Leyra v. Denno, 347 U. S. 556; Harris v. South Carolina, 338 U. S. 68; Turner v. Pennsylvania, 338 U. S. 62; Watts v. Indiana, 338 U. S. 49; Haley v. Ohio, 332 U. S. 596; Malinski v. New York, 324 U. S. 401; Ashcraft v. Tennessee, 322 U. S. 143. Whether Leyra v. Denno modified Stein v. New York, 346 U. S. 156—and if so, how far—we need not consider, as the undisputed facts here distinguish the instant case from Stein. Why the upper New York courts did not reverse the conviction we do not know, as they filed no opinions.

All decent Americans soundly condemn satanic practices, like those described above, when employed in totalitarian regimes. It should shock us when American police resort to them, for they do not comport with the barest minimum of civilized principles of justice. It has no significance that in this case we must assume there was no physical brutality. For psychological torture may be far more cruel, far more symptomatic of sadism. Many a man who can endure beatings will yield to fatigue. To keep

a man awake beyond the point of exhaustion, while constantly pummelling him with questions, is to degrade him, to strip him of human dignity, to deprive him of the will to resist, to make him a pitiable creature mastered by the single desire—at all costs to be free of torment. Any member of this or any other court, to escape such anguish, would admit to almost any crime. Indeed, the infliction of such psychological punishment is more reprehensible than a physical attack: It leaves no discernible marks on the victim.[5] Because it is thus concealed, it has, under the brutalitarian regimes, become the favorite weapon of the secret police, bent on procuring confessions as a means of convicting the innocent.

Caminito testified as follows as to why he confessed: At 10:30 P.M. on Monday, May 12th, the police allowed him to talk to Noia who had been similarly subjected to prolonged questioning. "He said, 'Let us give them (the police) the same story they gave us.' He says, 'It would not mean anything. * * * We can see a lawyer this way. We will tell the lawyer what happened, and they cannot do us nothing. We did not do it. You don't have to worry. You can prove where you were, and I can prove also.' I said 'No it is not right.' He said, 'How long can I stand this? * * * Let us make up the story they gave us and give them the same story and get it over with.' * * * So I told him the story that the detectives had told me of what happened, as I had heard maybe fifty times, so he said, 'That is the story they told me.' " They then agreed to confess. While confessing, when Caminito did not know

5. Perhaps it is inaccurate to describe such punishment as not "physical," since pronounced fatigue may have hidden physiological consequences.

the desired answer, the police captain told him what to say and he said it. "They put the words right in his mouth." He "gave those answers for fear." We do not rest our decision on that testimony:[6] Even without it, we are bound to infer, on the undisputed facts, that something of the sort actually happened. For his testimony in this respect closely resembles many reports of those who, behind the Iron Curtain, after like treatment, confessed to crimes they had not committed.[7]

Aristotle, thousands of years ago, wrote of torture "that people under its compulsion tell lies quite as often as they tell the truth, sometimes persistently refusing to tell the truth, sometimes recklessly making a false charge in order to be let off sooner. We ought to be able to quote cases, familiar to the judges, in which this sort of thing has actually happened. We must say that evidence under torture is not trustworthy, the fact being that many men whether thick-witted, tough-skinned, or stout of heart endure their ordeal nobly, while cowards and timid men

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6. The State makes much of the fact that, as to one single item of the confession, he testified that he had made it up without prompting.

7. In 16th century England, men suspected of treason were often physically tortured. But some received treatment like that the police used on Caminito. "One of the constant pleas of the victim was, in the pathetic words of Thomas Cromwell, 'not to make him languish long.'" Smith, English Treason Trials and Confessions in The Sixteenth Century, 15 J. of Hist. of Ideas (1954) 471, 483-484.

We are wont to think of torture as an accepted medieval mode of obtaining confessions. However, Lucas De Penna, a 14th century Italian lawyer, complained of that usage, although it was then legal to some extent. Such confessions, he wrote, "can have no value as evidence." Confessions not voluntarily given in the presence of a judge, he said, should not be received. See Ullman, The Medieval Idea of Law (1946) 159-160.

are full of boldness till they see the ordeal of these others; so that no trust can be placed in evidence under torture."[8] In the 16th century, Montaigne said that tortures "seem to be a test of endurance rather than of truth. For why should pain rather make me say what is, rather than force me to say what is not? * * * The effect is that the man whom the judge has put to the torture, that he may not die innocent, is made to die both innocent and tortured."

It is imperative that our courts severely condemn confession by torture, the so-called "Third Degree." To treat it lightly, to condone it, encourages its continued use, with evil effects on the police: The official who utilizes the Third Degree, since he violates statutes and the Constitution, is himself a criminal; and his infliction of torture on others brutalizes him.[9]

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8. The Roman view, expressed in the Digest, was that reliance on evidence received by torture "is a frail and risky thing, likely to be most deceptive. For most men through their suffering, or the cruelty of torture, so despise torture that the truth cannot be extracted from them; others are so incapable of endurance that they prefer to lie rather than suffer torture." See Best, Evidence (12th ed.) 476 note.

9. See Warner, How Can The Third Degree Be Eliminated? 1 Bill of Rights Rev. (1940) 24, 26-27: "That the third degree ought to be eliminated is obvious, for it degrades the police, destroys public confidence in them and confirms the anti-social attitudes of its victims. Torturing a man even for the laudable purpose of making him confess his guilt, divulge the names of his accomplices or tell where he hid the stolen goods, must inevitably have a hardening and debasing influence on the inquisitor. Besides the defilement of the officer does not end when he has secured the confession, for it will not do for him to admit how he obtained it. If he did, the confession would not be admissible in evidence and even if it were, no jury would believe it. There would also be danger that the jury would be so incensed that it would acquit the defendant as the best method of rebuking the police, even though other evidence proved him guilty. Hence police officers using the third degree

Hall remarks [9a] on the startling fact that there is hardly a single physical act of brutality inflicted by the * * * N. K. V. D. which American policemen have not at some time perpetrated" (but adds that our police are less "scientific" about torture). The important difference is that in Russia the coercion of confessions is (at least with respect to some subjects) legal and avowed while with us it is always illegal and secret. That difference is basic: It means that we have a principle of justice on which we can rely to bring such coercion into disrepute and disuse.

That principle the police traduce when they act on the theory that, to discharge their duty, they have the authority to dispense with a suspect's constitutional privileges because they believe him guilty. For it is not the function of the police in our democracy to determine a man's guilt.[9b]

Trials fairly conducted have, alas, led to the conviction of some innocent men.[10] All such tragedies cannot be avoided even in the best contrived of legal systems. But surely we dare not permit tragedies of that sort to result

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are strongly tempted not to let a nice regard for truth stand in the way of the conviction of a guilty man. If the praiseworthy desire to convict a criminal justifies giving him the third degree, surely it will countenance a little perjury especially by a police officer who has heard his confession and so knows that he is guilty!"

9a. Hall, Police and Law in Democratic Society, 28 Ind. L. J. (1953) 133, 140.

9b. Cf. People v. Rogers, 303 Ill. 578.

10. See Borchard, Convicting The Innocent (1932). Since 1932, the public records reveal dozens of such cases.

The most recent, reported in the press, on April 15, 1955, is the case of Leonard Harkins who spent 19 years in jail, and who was pardoned because others confessed to the crime, exculpating him.

from confessions by torture. One shudders to think what happens to an innocent man sent to jail.[11] Bitter, resentful, he may become an apt student of the hardened professional criminals he meets in jail, and thereby be converted from innocence into real criminality.[12] If he withstands such a conversion, he will, as a marked man, when released, have a hard struggle to earn an honest living.[13]

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11. See Campbell v. State of New York, 186 Misc. 586, 590:

"Claimant was tried in accordance with the orderly processes of criminal proceedings. There was no malice toward him upon the part of any official connected with the proceedings. His conviction was the result of mistaken identity. But claimant suffered grievously during his long term in prison and while on parole resulting from his arrest, conviction and confinement for the commission of crimes of which he was innocent. He was branded as a convict, given a prison number and assigned to a felon's cell. He was deprived of his liberty and civil rights. He was degraded in the eyes of his fellowmen. His mental anguish was great by reason of his separation from society and from his wife and family and in being deprived of the opportunity to afford them a living which they were compelled to seek from public authorities. He suffered the miseries of prison life and his confinement was doubly hard because he was innocent."

12. See, e.g., Hentig, 39 J. of Cr. L. (1938) 18; Haynes, 39 J. of Cr. L. (1948) 432.

Phelan, Tramp at Anchor (1954), writes that a "convict retains his reason and maintains his initiative exactly to the extent that he learns furtiveness, deceit, suspicion, sleight-of-hand and predatory alertness. His survival depends on the speed with which he can learn to behave like a professional thief."

13. See, e.g., O'Leary, The Twilight World of The Ex-Convict, The Reporter, June 8, 1954, p. 38.

See also Red Smith, New York Herald Tribune, November 4, 1953: "It is high time someone asked a question: What's wrong with hiring ex-cons? If someone doesn't hire them, they won't remain ex-cons indefinitely. * * * Where is he supposed to find employment? In a dark doorway, with a blackjack. * * * If the aim is to drive all ex-cons back to crime and prison, the surest method of accomplishing it is to shut off opportunities for an honest living."

If again charged with crime, he will encounter a serious difficulty at a trial: If he takes the witness-stand, his previous conviction will count against him; if, on that account, he does not testify, his silence will adversely affect him. And let it not be forgotten that police zeal to convict an innocent man means often that the guilty man escapes punishment.

We have here at some length expressed our abhorrence of confession by torture for this reason: That practice is unknown in England where, to our shame, they call it the "American method." There are those who say that American conditions compel such official resort to crime to catch and convict criminals. The absurdity of such a view is evidenced by the fact that our most effective American police force, the FBI, abjures this execrable method and, in its school for state and city police, teaches that the "third degree" is both detestable and inefficient. Because proof, in court, of its use is most difficult,[13a] the only real hope for its eradication lies in the educative influence of such police as the FBI, so that all our American policemen will be trained to detest it.[14] Repeated and emphatic judicial denunciations of that barbarism—whenever it is exposed, as in this case—can help to that end. Until that end is realized, the many decent police officers, in a police force generally addicted to that practice, will find themselves at so grave a disadvantage that sooner or later, they may, if they do not themselves indulge in it, at least acquiesce in it. For the accustomed ways of any group usu-

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13a. See, e.g., Frank, If Men Were Angels (1942) 317-318.

14. Cf. Frank, Administration of Criminal Justice, 15 F. R. D. 95; Frank, *If Men Were Angels* (1942) 331; Hall, Police and Law In a Democratic Society, 28 Ind. L. J. (1953) 133, 134.

aly come to seem the right ways. As Chesterton said,[15] "The horrible thing about all legal officials, even the best, about all judges, magistrates, detectives and policemen, is not that they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent); it is simply that they have got used to it."

At any rate, as long as many policemen third-degree the helpless, the public will tend to believe that all police officers do likewise, that police brutality, although unfortunate, is normal. (That such a belief is widespread, anyone can see who reads the hundreds of popular, hard-boiled, detective novels.) As a consequence, the public suspects that almost all policemen deal brutally with suspects. Accordingly, the citizenry do not regard the police with respect; and fail adequately to cooperate with the police, a cooperation without which the police in a democracy cannot efficiently perform their lawful functions.[15a] Worst of all, public cynicism develops concerning the basic ideals expressed in our Constitution.

As we said in 1947, in In re Fried, 161 F. (2d) 453, 459-460 (C. A. 2): "The 'third degree' and cognate devices alarmingly persist in this country. The reports of the United States Supreme Court alone disclose eight cases in the six years 1940-1945 in which convictions were reversed because of the use of coerced confessions. The indications are that the following statement, made in 1930 by a Committee of the American Bar Association, could be made today: 'It is conservative to say that for every one of these cases which do by a long chance find a place

15. Chesterton, *Tremendous Trifles* (1909) 85-86.

15a. See Hall, Police and Law In a Democratic Society, 28 Ind. L. J. (1953) 133, 135, 145.

in the official reports, there are many hundreds, and probably thousands of instances of the use of the third degree in some form. Until such miserable misbehavior is stamped out, it will remain an empty boast that we have, and that we respect, a Constitution which guarantees civil liberties, blocks representatives of government from lawless incursions on the rights of the individual. As possible prosecution of offending officers and civil actions for damages against them seem to have no practical value, the courts, unfortunately, can do little to eliminate these evils; but what slight powers they have to do so they should vigorously exercise." [15b]

15b. See Radin, Pretense and Reality in Criminal Law, 4 Oregon State Bar Bulletin (1939) 134, 144-145, 146, 148:

"We cling to the belief that a man arrested or accused may stand mute if he wishes. The difference between our theory and our practice here is too well known to be much labored here. The rule against self-incrimination holds for respectable citizens, that is for us, citizens who can hire lawyers, who should be encouraged to hire lawyers. Does it hold for the ordinary man? Surely only when the police are well-disposed; because, if they are not, there is nothing the victim can effectively do about it. When he is not afraid to do anything at all, he is helpless because he simply will not be believed. Obviously the stories told about the third degree, which is the symbolic way of describing the rejection of the privilege against self-incrimination, are monstrously exaggerated. But they are true in part, in far too great a part. And we are inclined to condone the third degree or to attempt to ignore it, because the police, honest police, often tell us that they cannot quite get along with it. Why can't they get along without it? Simply because every-day experience tells us that one of the most effective ways of eliciting information about anything is to discuss it with the persons who have had, or may have had, anything to do with it. The accused is a person who may have had something to do with the crime. If he refuses to talk at all, we are often helpless, not merely in relation to knowing whether he is guilty, but in relation to any means of further investigation. Guilty or not guilty, he could give us clues. He refuses to. Therefore, say the police, in private to

Recently many outstanding Americans have been much concerned—and justifiably—with inroads on the constitutional privileges of persons questioned about subversive

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be sure, we call for rubber hose and direct torture. A common element in the third degree is keeping a man awake for forty-eight hours; that is a definite form of torture. The third degree is a shameful thing. It is shameful because it is cruelty practiced on helpless persons by powerful persons. It is doubly shameful because it is furtive; it is used and then officially denied, because we respectable citizens refuse to admit its existence, because we like to boast of an institution that rejects it.

"I have said, and I mean it, that the majority of us prefer to be on good terms rather than bad terms with our consciences. When we say we regard the right of habeas corpus and the right against self-incrimination as precious and valuable, we should like to mean what we say. And we do not like to feel that we mean 'good for us' but not good for a lower class that has no business to enjoy such fine things. Evidently we could do a drastic thing. We could abolish habeas corpus and the rule against self-incrimination for everybody. In that case we should not find these institutions in our way when we want to protect ourselves against criminals. We have no intention of doing that.

"But, if we are realists, pragmatists, actualists, we ought not to go on indefinitely divorcing our practice from our theory. We do not dare assert that a large number of our fellow citizens are not good enough to enjoy the benefits of habeas corpus and the rule against self-incrimination. However brutal and undemocratic, that assertion would have the merit of honesty. It seems to me that what we ought to do is to make up our minds about what we really want and how much we are ready to sacrifice for it. * * * We want protection. Against whom? It is easy to say, against the criminal. But how can we recognize him? * * * It is a matter that deserves careful study. But it is a hard study. Some of it has been made, but under the most adverse conditions and with the greatest discouragement on the part of lawyers. Lawyers are given to turning their eyes away from it and hoping impatiently that not too many members of their perfectly good profession will be tempted into the byways of these criminological frills and whatnot. And the general attitude is that we are getting

activities.[16] But concern with such problems, usually those of fairly prominent persons, should not blind one to the less dramatic, less publicized plight of humble inconspicuous men (like Caminito) when unconstitutionally victimized by officialdom. It will not do to say—as some do—that deep concern with such problems of the humble is the mark of an "old-fashioned liberal." For repeated and unredressed attacks on the constitutional liberties of the humble will tend to destroy the foundations supporting the constitutional liberties of everyone. The test of the moral quality of a civilization is its treatment of the weak and powerless.

Reversed.

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along passibly as we are, and that the difficult problem * * * takes more time and effort and energy than it is worth.

"So long as we say in effect to the police: 'You may act like thugs as much as you like. You may use third-degree methods, the rubber hose, enforced waking, and worse, provided you do not do these things to people that can pay us a fee,' the police will leave our prospective clients alone and concern themselves only with those whom we do not desire as clients. Now it takes little intelligence to apply a rubber hose, to turn a calcium light full into the eyes of a person propped up on a little stool. If this is the job we assign to the police, we shall not get a very intelligent police. But if we decide to make our practice and our theory coincide, we shall first have to join forces with the police; and the kind of police with which we can cooperate will have to have, of course, some at least of our training."

16. See, e.g., Taylor, *Grand Inquest* (1955); Griswold, *The Fifth Amendment Today* (1955); Barth, *Government By Investigation* (1955); United States v. Ullman, F. (2d) (April 20, 1955); cf. Stouffer, *Communism, Conformity and Civil Liberties* (1955).

CLARK, *Chief Judge* (concurring in the result).

Since the coercion here was so much more direct and extensive than that in *Leyra* v. *Denno*, 347 U. S. 556, I agree that we must reverse on the authority of that case. But however much I support in the abstract the severe criticisms of police methods voiced in the opinion, I do not believe it helpful so to stress them here in derogation of a great state court which has the primary responsibility for law administration in this community. Since no court really rejects altogether evidence by way of confession or from the informer, the question becomes one of degree; and I can respect the views of the state judges as rationally developed, even though I must disagree. Nor do I have basis for selectivity among law enforcement agencies or among forms of crimes in reaching the result or apportioning criticism. Therefore I prefer to limit myself to the facts here and eschew the more general admonitions.

I am led more readily to this caution because I doubt the utility for dignified or effective law enforcement of review and overturn by any federal judge of the reasoned conclusions reached by a whole hierarchy of state tribunals. We are properly charged with supervising the trials in the federal district courts, but our sphere of superintendence should not extend to state police activities; there the state courts should have the burden, subject only to certiorari by the Supreme Court in the few cases where needed. Consequently the pending legislation to that end, drafted by a committee of the Judicial Conference of the United States and supported by the Conference of State Chief Justices, seems wise policy. Meanwhile, however, our duty in premises such as these is clear, and needs no particular amplification or embroidery.